No. 2336

United States

Circuit Court of Appeals

For the Ninth Circuit

WHITLA & NELSON, a Copartnership, Attorneys for the LANE LUMBER COMPANY, a Corporation, Bankrupt.

Petitioner

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the Lane Lumber Company, a corporation, Bankrupt, and L. C. WILSON, Receiver of the State Bank of Commerce of Wallace, Idaho,

Respendents.

IN THE MATTER OF THE LANE LUMBER COMPANY, A CORPORATION, BANKRUPT

BRIEF OF PETITIONERS

EZRA R. WHITLA,
RALPH S. NELSON,
In Proper Person.
Residence and P. O. Address,
Coeur d'Alene, Idaho.
Attorneys for Petitioners.

GRAVES, KIZER & GRAVES,
Residence and P. O. Address,
Spokane, Washington,
Of Counsel

JOURNAL QUICK PRINT, COEUR D'ALENE--1702

No. 2336

United States

Circuit Court of Appeals

For the Ninth Circuit

WHITLA & NELSON, a Copartnership, Attorneys for the LANE LUMBER COMPANY, a Corporation, Bankrupt.

Petitioner

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the Lane Lumber Company, a corporation, Bankrupt, and L. C. WILSON, Receiver of the State Bank of Commerce of Wallace, Idaho,

Respendents.

IN THE MATTER OF THE LANE LUMBER COMPANY, A CORPORATION, BANKRUPT

BRIEF OF PETITIONERS

Statement of Fact

Sec. 1. Statement: PRECISE QUESTION SUBMITTED.

The precise question as submitted to the District Court by the referee in bankruptcy in this matter, as shown by the record, was, "Is the amount allowed the attorneys for the bankrupt herein, as attorneys' fees in said proceeding, towit, the sum of twenty-seven hundred and fifty-five ($2755.) dollars, excessive? (Record, page 55.)

On a writ of review to the District Court it reduced the above allowance from $2755.00 to $385.00. (Record, page 72).

The question now before this court is: 1st. Did the District Court err in refusing to allow the attorneys fee for preparing the schedules at professional rates and reducing the allowance made by the referee to a sum set by him as reasonable compensation for clerical work?

2nd. Did the District Court err in refusing to allow bankrupt's attorneys a per diem for the services actually rendered in attending the first meeting of creditors as counsel for the bankrupts, when it was ordered to attend by the referee.

Stated otherwise, is the sum of $2755.00 or the sum of $385.00, a reasonable fee to be allowed in this case for the work done, taking into consideration the *nature of the service, the time necessarilly employed thereon, the amount involved, the responsibility assumed, and the result obtained?*

Sec. 2. Statement: NATURE OF SERVICE. PREPARATION OF SCHEDULES.

On the 29th day of July, 1911, the above named Lane Lumber company, a corporation, was duly adjudged an involuntary bankrupt by the United States District Court, for the District of Idaho, Northern Division. At about this time P. H. Wall, president of the bankrupt corporation, came to the offices of Whitla & Nelson, your petitioners, in Coeur d'Alene, Idaho, and made arrangements with

the firm to represent the corporation in the bankruptcy proceedings. By this arrangement Whitla & Nelson were to prepare the schedules for the corporation and to do all acts necessary to properly represent it in said proceedings.

The corporation had no funds to pay the attorneys and it was agreed between its officers and your petitioners that your petitioners were to be paid whatever amount the court would allow them as attorneys for the bankrupt, the entire matter was to be submitted to the court and it was to make the allowance for the services performed. No other payment was made for the services of the attorneys.

At the time of this agreement the bankrupt had been out of the possession of its books for several months, the corporation having been in the hands of L. F. Connolly, receiver, who had been appointed several months previous to the adjudication of bankruptcy, by the District Court of the First Judicial District of the State of Idaho. The officers of the bankrupt corporation did not know the exact condition of its affairs and had no accurate recollection as to a great many of the claims, that is as to whether they were secured or unsecured, the amount, and had no knowledge as to what was to go into the schedules. Most of its financial transactions had been handled by its treasurer, B. F. O'Neil, President of the State Bank of Commerce of Wallace, who was the principal stockholder, and who was also a fugitive from justice on account of his

banking transactions, State v. O'Neil, 135 Pac. 60.

It was therefore absolutely necessary that your petitioners have the books of the bankrupt corporation before they could intelligibly prepare the schedules. The receiver in the state court refused to turn over the books and records to the bankrupt corporation or to its officers, or to their attorneys, your petitioners. Several attempts were made to get possession of these books and it finally became necessary for your petitioners to make a written application to the court and secure an order directing the Receiver to allow them the possession of the books for the purpose of preparing the schedules. This order was granted by the court and the books finally obtained, all of which took considerable time.

When the books were obtained your petitioners discovered that they had been kept in a very loose and unbusinesslike manner. The record herein will disclose that many matters of personal concern were mixed with those of the corporation in keeping thebooks, and that the books, which included transactions covering a period of a number of years, had, during a greater part of the time, been kept as above stated, in a very loose and unbusinesslike manner and it made the preparation of the schedules very difficult. It was necessary for your petitioners to examine carefully and at great length the books of the company and both Mr. Whitla and Mr. Nelson, and their stenographer, Mr. Nash, spent about three weeks time in going over these books and

in preparing the schedules. (Record, pp. 28-29).

To ascertain the exact condition of some of the claims that they might be intelligibly listed in the schedules it was necessary for Mr. Whitla, one member of the firm to make several trips to Spokane to interview different creditors. (Record, p. 29). The schedules covered something like one hundred typewritten pages.

Sec. 3. Statement: NATURE OF SERVICES. ATTENDANCE UPON FIRST MEETING OF CREDITORS.

The first meeting of creditors included thirty-seven different hearings, all of which your petitioners attended on behalf of bankrupt. The Referee before whom all of the hearings were had, and, of course, was well informed in the matter, found in his findings, (Record, pp. 41-42): "The court finds that bankrupt's attorneys appeared and took part in the hearings in this case thirty-seven days, and that all of said time was necessarily employed by said attorneys and that in addition to said time attorneys also spent a large amount of time and labor in advisory services with said bankrupt and in preparing authorities upon various questions involved, *and the attendance of said bankrupt's attorneys in court on all of said days was under the direction and order of this court.*

During this great number of hearings your petitioners were in almost constant consultation with the officers of the bankrupt and did everything in

their power to assist the administration of the estate and did nothing to retard or delay the administration of said estate. Your petitioners had many conferences with the attorney for the trustee in securing the true facts of the complicated matter.

Sec. 4. Statement. NATURE OF SERVICES. OBJECTIONS TO THE CLAIM OF L. F. CONNOLLY, RECEIVER.

During the administration of the estate, L. F. Connolly, receiver in the state court, filed in the bankruptcy court, as receiver in said state court, a claim for a large amount of expenses, including attorney's fees, which were deemed improper on behalf of the bankrupt. The attorneys for bankrupt objected to said claim and filed their objections in writing and also made their objectons in open court, which were concurred in by others. No one, including the trustee, cared to urge their objections or prepare a brief and attorneys for bankrupts, your petitioners prepared a brief and made oral argument to the court in the matter.

The Court sustained the objections to the claim of the Receiver and there was approximately eleven or twelve hundred dollars asked for by the Receiver in the State Court, disallowed. Two days time of petitioners was spent in getting out their brief and some little time spent in arguing the same before the Referee.

Sec. 5. Statement. TIME NECESSARILY EMPLOYED.

The officers of the bankrupt corporation made arrangements with petitioners to represent them some time ~~ago~~ about the 29th day of July, 1911, and about three weeks time of both members of the firm and their stenographer was spent in preparing the schedules.

The first meeting of creditors, all of the hearings of which your petitioners attended, and which were thirty-seven in number, extended from about the 26th day of August, 1911, to the 25th day of November, 1912. From the time of the employment of your petitioners as attorneys to represent the bankrupt to the final adjournment of the first meeting of creditors November 25, 1912, a period of sixteen months, your petitioners were busy in this matter, not only in preparing schedules and attending meetings of creditors, but spending many days in their office preparing for the work, advising with their clients and with the trustee. The testimony taken covered about 1500 pages.

Sec. 6. Statement. AMOUNT INVOLVED.

The schedules disclose liabilities in the sum of $415,874.78, and assets claimed by the bankrupt, worth $771,201.50. Of this $532,940 was real estate, the balance consisted of personal property and accounts.

The value put upon this property by the officers of the bankrupt may have been very much too high,

or the appraisers may have appraised the property too low, but be that as it may, the appraisers appraised the value of the property at only $217,996.63.

On October 1, 1908, a trust deed was placed on the property of the corporation under which bonds in the sum of $125,000 were sold. A large amount of timber lands was also secured after this, and a large new mill was also afterward built.

The property at that time was not nearly so valuable when it was bonded as at the time the company was adjudicated bankrupt, and as a matter of common knowledge, and we think the court will consider the same, that bonding companies before considering large loans like this, investigate the property and loan not to exceed one-third of what they find the value of the property to be at that time. The property considered to be one of the largest sawmill plants in North Idaho, located at Harrison, Idaho, which was built afer the above mentioned bond issue was made. Besides this it was an operating going concern, having on hand a great amount of sawed lumber, lathe and logs, sufficient to conduct the business of a wholesale lumber manufacturing plant and had all the necessary horses, trucks, logging outfit, boats, machinery of every kind and extensive logging-railroad equipment.

Sec. 7. Statement. RESPONSIBILITY ASSUMED.

As above stated the books and records of the Lane Lumber company, bankrupt, were in a very

complicated and chaotic condition and the officer who had handled the principle financial affairs of the company was a fugitive from justice.

Again, your petitioners by becomming attorneys for the bankrupt were precluded from claims in the estate and as a matter of fact turned away thousands of dollars worth of claims which they would have represented had they not been attorneys for the bankrupt, and some of these claims were afterwards allowed as prefered claims.

The bankrupt company was one of the large corporations of North Idaho. As found by the appraisers the property was worth $217,996.63. The preparation of the schedules on account of the condition of the records of the company was very difficult and a firm of lawyers preparing such schedules for the court in a case like this where the preparation of the same is difficult on account of the complicated condition of affairs, desire greatly to have the same so prepared that the court will have some definite idea of what the property of the bankrupt consists, of its nature, description and value when they are filed.

During the administration of this estate the trustee filed and swore to eighteen criminal complaints against the officers of the bankrupt. On all of these charges the court before whom the cases were tried held that there was not sufficient evidence to warrant holding the defendants. There was during the entire first meeting of creditors a disposition on

the part of the trustee and some of the creditors to institute criminal proceedings against the officers of the bankrupt corporation and to hold that the bankrupt was guilty of criminal acts. This feeling was probably caused to some degree by the chaotic condition of the books and of the loose manner in which the business of the bankrupt concern had been conducted. The Referee in bankruptcy, undoubtedly aware of this feeling for the bankrupt corporation ordered your petitioners to attend all meetings of creditors. (Record, p. 41-42).

Your petitioners during all of the meetings of creditors did everything possible at all times to bring a proper understanding of the books and affairs of the corporation to the creditors of the bankrupt and did everything possible to facilitate the administration of affairs and spent much time in studying the affairs of the bankrupt corporation and in consulting with its officers to the end that all of its affairs might be satisfactorily explained to the court and creditors.

The work of your petitioners was not at all times pleasant but bearing in mind their duty as attorneys and officers of the court, did everything to hasten the administration of the estate.

Sec. 8. Statement. THE RESULT OBTAINED.

The Schedules as prepared by your petitioners, although they cover almost one hundred pages of typewritten matter and include many technical de-

scriptions of real property, fully set forth all of the property of the bankrupt and stated the condition of all the different claims as fully as possible and was entirely satisfactory to the Referee in bankruptcy and the trustee.

The result obtained by your petitioners ojbecting to the claim of L. F. Connolly, receiver in the state court, as filed by him in this matter, was the expunging of a claim in the sum of eleven or twelve hundred dollars against the estate, which would have been a prior claim. A charge of $100 was made for the services in the proceedings included in the objections and brief on objections and contesting the claim of L. F. Connolly, receiver, for allowance of fees and expenses to himself and attorney. As above stated as a result of these services his claim was reduced some eleven or twelve hundred dollars. (Record, p. 41).

The result of your petitioners attending all meetings of the creditors was entirely satisfactory to the referee in bankruptcy, who found that all the time they had spent in attendance upon the same was necessary. That their attendance upon these meetings undoubtedly hastened greatly the administration of the estate and produced a clear and full understanding of all the complicated affairs of the bankrupt corporation by the trustee and creditors on the one hand and the corporation on the other.

Sec. 9. Statement. FEE AS CLAIMED BY PETITIONERS.

A charge of $25.00 on August 4, 1911, and a charge of $15.00 on August 7, 1911, and another charge of $15.00 on August 12, 1911, was made against the bankrupt for matters connected with the Connolly receivership after the bankruptcy proceed-(ings had been instituted and prior to the time the schedules were filed. These charges were relative to the matter of securing possession of the books so that the schedules could be properly prepared.

Several consultations were held by the officers of the bankrupt company and your petitioners in reference to how the books were to be obtained and several attempts were made to get these books before the application to the court was made by the petitioners, but finally it became necessary for your petitioners to make application to the court for an order to secure these books, which was granted.

A charge of $750 was made for the preparation of the schedules. The undisputed testimony is that almost three weeks time of both members of the firm and the stenographer was spent in preparing these schedules. (Record, p. 29), and the referee in bankruptcy so found in his finding. The Honorable District Judge made allowance for getting together the data for preparing the schedules for ten days but allowed only what he thought an accountant could be employed for, or $15 per day. (Record, p. 65).

A charge of $50 per day was made for attending the bankruptcy court for thirty-seven days. Besides attending the hearings on the thirty-seven different days your petitioners spent probably as many days in consultation and advising with the officers of the bankrupt in regard to their testimony and in regard to the affairs of the corporation to assist in the administration thereof and in preparing for the many legal questions involved, but no charge was made for any advice given during the first meeting of creditors or for the time spent in the office looking up authorities and in preparing papers. Your petitioners intended that $50 per day charge for actual attendance in court should cover all the other work done.

Sec. 10. Statement: FINDING OF REFEREE ALLOWING ATTORNEY'S FEES.

On the 11th day of December, 1912, and after the final adjournment of the first meeting of creditors your petitioners filed a petition with the referee in bankruptcy praying for the allowance of attorneys' fees to them as attorneys for the bankrupt, attached to which was an itemized account of said services. Objections to the allowance of said attorneys' fees was filed on behalf of some of the creditors. On the 9th day of April, 1913, after due notice given to all of the creditors, the petition for the allowance of attorneys' fees to your petitioners, came regularly on for hearing before the referee in bankruptcy. None of the objecting creditors or their attorneys,

or anyone on their behalf, appeared in said hearing. The Referee directed your petitioners to proceed with their proof, whereupon said petition, the objections thereto, the itemized fee bill attached to said petition, and the testimony submitted by claimants were fully heard and considered by the Referee and the matter taken under advisement. (Record, p. 39).

No one appeared in support of the objections to the allowance of the fees and proof of the nature of the services rendered was not gone into at great length, but oral testimony of the reasonableness of the charge was submitted. (Record, p. 39).

On the 19th day of May, 1913, the Referee in bankruptcy made and filed his order allowing your petitioners the sum of $2755.00 as fees, and thereafter and on the 28th day of May, 1913, a petition for review was filed by L. C. Wilson, receiver of the State Bank of Commerce, and E. N. LaVeine, attorney for the trustee. The petition for review with all necessary papers were submitted to the District Judge for hearing. Said petition for review come on for hearing before the District Court and said matter was duly heard and considered and taken under advisement. Thereafter and on the 7th day of July, 1913, said District Judge rendered his decision revising the order of the Referee and directing that only $385 be paid to your petitioners instead of the sum of $2755, and further directed that said sum be paid in the course of administration, if there were sufficient funds available therefor, otherwise the

claim was to share ratably with others of like dignity.

Sec. 11. Statement.—ORDER AND FINDING OF REFEREE IN ALLOWING ATTORNEYS' FEES.

The Referee in bankruptcy before whom all of the proceedings were taken and before whom the testimony in regard to the work done and the reasonableness of the fee, was submitted and who is better acquainted probably with the facts than any other person and with the feeling existing during the meeting of creditors, found that the different charges made by your petitioners were reasonable and further found, "That for these services said attorneys have made a charge of $50 per day for the time actually spent in court and no extra charge has been made for the advisory services and research and preparation made by said attorneys, and the court finds that said charge was and is a reasonable charge for said services nd that the bankrupt's attorneys are entitled thereto, and that the services in all amount to the sum of $2755, which said sum was and is a reasonable charge and allowance to be made to bankrupt's attorneys for the services performed herein."

SPECIFICATION OF ERRORS.

I.

The District Court erred in holding that petitioners were not entitled to compensation for the services rendered in getting possession of the books

of the bankrupt so that the necessary data could be secured therefrom with which to prepare to schedules, being the bills presented for fees on August 4, $25.00, August 7, $15.00 and August 12, $15.00.

II.

The court erred in holding that petitioners and appellants were not entitled to an allowance of $100.00 for their services in contesting the claim of L. F. Connolly and in expunging the same as charged for in their fee bill, and as allowed by the Honorable Referee in Bankruptcy.

III.

The court erred in holding that petitioners as attorneys for the bankrupt were not entitled to the sum of $750.00 for preparing the schedules of the bankrupt, and also in holding that the services performed in securing the data with which to prepare said schedules was the work of an accountant and in refusing to allow for said services the professional rates of an attorney, and in making an allowance therefor as for the services of an accountant at the rate of $15.00 per day for ten days, in that this was the duty required of the bankrupt by the bankruptcy law for which it was entitled, under the bankruptcy law, to employ counsel, and to receive payment for such counsel at professional rates.

IV.

The Honorable District Court erred in holding that petitioners were not entitled to a per diem for their time in the bankruptcy court on the first meet-

ing of creditors, covering a period of thirty-seven days from August 1911, to November, 1912, at the rate of $50.00 per day and in rejecting this claim and refusing the bankrupt compensation for such services, excepting the sum of $100.00, in that the bankruptcy law imposes upon the bankrupt the duty of attending the first meeting of creditors when ordered and directed to do so by the court or judge thereof, and in this case the bankrupt's officers were directed to attend the first meeting of creditors by the court and did attend as shown by the record a period of thirty-nine days, and the bankrupt's counsel was in attendance during thirty-seven days under the direction and requirement of the Referee in Bankruptcy, and a per diem of $50.00 per day as charged for for said time was reasonable for such services.

V.

The Honorable District Judge erred in holding that in consideration of economy it was required by the bankruptcy law that the fees in such cases should be reduced to a small amount, even to the extent that the amount allowed the bankrupt's attorneys would be inadequate reasonably to compensate them for the time actually expended upon the hearing, for the reason that the bankruptcy law requires that as a matter of right a reasonable compensation be paid to the attorneys for bankrupt in involuntary cases while performing the duties imposed upon them by the Bankruptcy Act.

VI.

The Honorable District Judge erred in reducing the allowance made by the Referee in Bankruptcy from $2755.00 to $385.00 for the reason that the allowance made by the Referee, to-wit, the sum of $2755, was but a reasonable compensation for the services of the bankrupt's attorneys, performed for the bankrupt while discharging the duties imposed upon him by law, and all of the evidence introduced in this action shows that the sum of $50 for the time actually expended in the bankruptcy court was but a reasonable charge therefor, and that the other charges made by the bankrupt's attorneys were but reasonable charges for the services performed, and that all of said services were such as were imposed upon the bankrupt by the Bankruptcy Act and for which an attorney's fee was allowable, and the amount allowed by the Referee was but reasonable compensation for the professional services actually performed for the bankrupt in the performance of the duties imposed upon it by the Bankrupt Act.

ARGUMENT AND CITATION OF LAW AND AUTHORITIES.

Sec. 12. BANKRUPTCY LAW INVOLVED.

(The Itatics throughout this brief are ours.)

The bankruptcy law relating to the duties of the bankrupt are as follows:

"Sec. 7. Duties of Bankrupt.—a. The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge

thereof to do so, and the hearing upon his application for a discharge, if filed; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, * * * a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residence, if known, if unknown, that fact to be stated, the amount due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate."

This is the provision for the duties of the trustee, and Section 64, b, subdivision 3, providing for the cost of administration, provides as follows:

"(3)" The cost of administration * * and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the peti-

tioning creditors in involuntary cases, to the bankrupt in involuntary cases *while performing the duties herein prescribed,* and to the bankrupt in voluntary cases, as the court may allow."

Sec. 13.—ATTORNEYS NECESSARY IN PREPARING SCHEDULES.

Judge Dietrich in his opinion in reference to the legal services required in preparing the schedules holds:

> "Unquestionably a measure of professional knowledge and skill is required for the proper discharge of such duty, and perhaps in almost every case some allowance upon this account may properly be made * * * ".

There can be no question but what when the bankrupt's affairs are in a complicated condition and the officers of the corporation have been out of its control for some time and the assets of the corporation are worth several hundred thousand dollars, consisting of sawlogs, lumber, large lumber plant, a great deal of real estate covering a vast area, together with other personal property and accounts, and the assets of such corporation are over $750,000 the services of an attorney is necessary in preparing the schedules. In the case at bar the books and accounts of the corporation, consisting of a wagon load of records, were before the referee in bankruptcy and were examined on numerous occasions by him and he was acquainted with the work that the attorneys did in preparing the schedules and the trouble they had in arriving at the facts. The referee in bank-

ruptcy knew all of these facts, explicitly found that the services of the attorneys were necessary and that the attorneys spent about three weeks time in preparing such schedules and that such work was worth $750.

Judge Dietrich says: "It is difficult for him to see how any difficult or intricate question could be involved in such a case." He had before him no evidence or finding in conflict with the finding of the referee. It seems to us that it is unfair for the judge to hold "that the services rendered were such as a competent clerk or accountant might have performed, and compensation must be awarded upon that basis," when the referee knowing all of the facts in the case and hearing the evidence and knowing the complicated condition of the books and chaotic condition of the accounts, and the question involved, found that the work was not that of an accountant. (Record, p. 40), but that it was necessary for the attorneys to spend the time on these schedules that they did spend. (Record, p. 40).

The court, *In Re Anderson*, 103 Fed. 855, says:

> "The bankrupt in such cases is required to prepare schedules, which require the services of a lawyer: and, if he is compelled to attend references before the referee in matters involving the conduct of his business prior to the bankruptcy, he should be allowed services of counsel, to the extent of protecting his rights on the inquiries so made. This is in aid of the proper ad-

ministration of the estate, and allowances out of the estate should be strictly limited to services so rendered."

In that case the court held that the attorney was entitled to his fees for *all* services rendered in the line of the duties performed by him.

In Re Kross, 96 Fed. 816, the court says:

"Among the first and most important duties specially enjoined by the act upon the bankrupt in involuntary cases that presumably require an attorney's services are those stated in paragraph 8 of section 7, viz.: the preparation and filing of schedules of his property and creditors, with all the particulars there specified. In voluntary cases the same schedules are required to accompany the petition; and ordinarily bankrupts are unable to prepare such papers properly, or to comply with the rules and orders pertaining thereto, except by the aid of a professional attorney."

Sec. 14. COUNSEL NECESSARY AT MEETING OF CREDITORS.

It may not be necessary for counsel for bankrupt in every case to attend all the meetings of creditors, but in the case at bar the referee in bankruptcy held that "the attendance of said bankrupt's attorneys in court in all of said days was under the direction and orders of this court." (Record, p. 41). This is the testimony and is undisputable. (Record page 34.) Judge Dietrich says that he had before

him a number of orders but did not find among them any order of the referee requiring your petitioners to attend the meeting of creditors. (Record, p. 70).

It seems to us unfair for the learned judge, in the absence of any evidence to support such a finding, to hold that the referee did not order your petitioners to attend said meetings of the creditors or that the attendance upon said meetings was unnecessary. The bankruptcy act provides that the bankrupt shall be present at the first meeting of creditors if directed to do so. Judge Dietrich holds bankrupt's officers were ordered to attend (page 70)

Remington on Bankruptcy, para. 2086:

> "It has been contended that bankrupt should not be entitled to reimbursement of his attorney's fees for the attorney's presence at the bankrupt's general examination, on the theory perhaps that all the bankrupt has to do on his general examination is to testify to the truth and that he needs no attorney to help him do that. The practice, however, is the other way, and attorney's fees for attendance at the bankrupt's examination are customarily allowed."

The Federal Court has even held that where the client was in contempt that notwithstanding the fact that the attorney was entitled to a per diem allowance for the time actually expended.

In Re Mayor, 101 Fed. 695;

The *preparation of schedules* by the bank-

rupt in involuntary cases, *and his attendance on complsory examination before the referee*, are matters in discharge of his duty, for the benefit of the estate, and each may require the services of an attorney, for which the estate thus receiving the benefit is chargeable for reasonable compensation; * * * I am of the opinion that bankrupt is entitled to counsel while undergoing his examination before the referee in respect of his affiars in conduct. Ordinarily this should not require attendance on more than one or two days. If extended, however, at the instance of the creditors or trustee, without delay needlessly caused by the conduct of the bankrupt in the examination, the time so occupied must be computed in making the allowance. The examination should be conducted with reasonable dispatch, and without unnecessary adjournments; and if in any case, there is procrastination or prolixity on the part of the moving parties, the increased expense must be borne by the estate represented. The number of days of actual service within this view will be determined by the referee, and thereupon a per diem allowance of $25, as charged in the statement filed herein, is deemed reasonable, and in accord with the views expressed in *Re Curtis, supra.*"

In *Re Coonolly & Son,* 120 Fed 886, cited by the trustee in the lower court to sustain their contention that your petitioners were charging for mere

clerical work, the court will find by a perusal of this case that it was there held by the District Judge that counsel fees for preparing the schedules were allowable and also counsel fees for the time spent in going over the books were allowable, but disallowed the items charged for posting bankrupt's books and making extra copies of the schedules. No charge for clerical work as set forth in that case is attempted to be charged for here. In this matter the bankrupt's attorneys are charging for the preparation of the schedules covering about one hundred pages, and for services in securing the information which it was absolutely necessary to have in order to prepare the schedules.

There is no charge whatever for clerical services such as posting of books or making extra copies of the schedules, as was attempted to be done in the Connolly case above cited. The referee in bankruptcy specifically found that the charges of the attorneys and the work of the attorneys did not cover or include any clerical work.

In the ordinary cases where $50 is allowed for preparing schedules they are prepared on blanks furnished by the court, but in this case the schedules speak for themselves, covering 100 pages of typewritten matter and as the referee knew, the facts therein set forth were obtained by the attorneys only through great labor.

It seems to the appellants that the entire premises upon which the Honorable District Judge has bas-

ed his decision is erroneous and cannot be sustained upon any principal of law in this case.

Section 7, subdivision a, of the Bankruptcy Act, provides what are the duties of the bankrupt and among them are "(1) to attend the first meeting of creditors if directed by the court or judge thereof so to do."

The Honorable District Judge has found that the bankrupt was required by an order of the court to attend this first meeting of creditors.

Subdivision 8 of this same Act makes it his duty to prepare, make oath to and file in court schedules of his property, showing the amount, kind thereof and its location and money value thereof in detail, and also requires a detailed statement of the affairs of the bankrupt and this evidently was meant to be for the benefit of the trustee and creditors so that the trustee and creditors upon the examination of the schedules could find the location, character and value of the bankrupt's property, and also a detailed statement of his affairs including all of his creditors, their securities, if any, and otherwise.

Section 67b of the Bankruptcy Act provides among other things, what is to be charged as costs of administration as follows:

> "3. The cost of administration ------ for one reasonable attorney's fee for the professional services *actually rendered*, irrespective of the number of attorneys employed, to the petitioning creditors in voluntary cases, *to the bankrupt*

in an involuntary case, while performing the duties herein prescribed and to the bankrupt in voluntary cases as the court may allow."

Your petitioners respectfully submit to this honorable court that under the construction of the statute that the law has specifically provided for the payment of an attorney's fee to the bankrupt in involuntary cases for professional services actually rendered while peforming *any* and *all* of the duties imposed upon him by law, and it is not for the court to say whether or not he thinks the bankrupt might have been able to get along without an attorney, as the statute has specifically provided for the payment to him of such a fee, and also for the payment to petitioning creditors in involuntary cases of such fee, but in cases of voluntary bankruptcy it has left the payment of the fee to the court to determine. In other words, an absolute liability is imposed by the bankruptcy act for the payment of attorney's fees to the petitioning creditor and to the bankrupt in involuntary cases, and if in this case the services rendered by the attorney for which the claim is made were performed for the bankrupt while he was performing the duties prescribed by the Bankruptcy Act, then they are allowable and their payment is specifically provided for by the Bankruptcy Act, leaving it to the court only to regulate the amount of such payment and not to decide whether or not the attorney should be paid any sum whatever.

These sections of the bankruptcy act, have been

construed by the Circuit Court of Appeals several times, and in construing the same in Smith v. Cooper, 120 Fed. 230, the Honorable Circuit Court of the Fifth Circuit, citing from in re Curtis 100 Fed. 785, said:

> "The attorneys for the petitioning creditors are entitled to this reasonable fee *as of right.* Its allowance or disallowance is not matter of discretion ------ The amount must in all cases be reasonable, *to be determined upon evidence of the service performed and of its value and in the absence of evidence of its value, by the court from knowledge of its worth.*"

While this was upon the question of the fees for petitioning creditors, it is the construction placed upon this same section and applies equally to the attorney's fees for the bankrupt.

Among the duties imposed upon the bankrupt are the preparation of the schedules. This is unquestionably such a matter as requires the services of an attorney and compensation is allowable therefor, not at the rate of ordinary clerks and accountants, but at the rate charged by attorneys for their services, as the statute provides for the bankrupt employing attorneys and they are to be paid for at professional rates and not at the rate of a clerk or bookkeeper. It seems to us to be clearly erroneous for the court to hold that it is necessary in the preparation of

schedules to use a large amount of work and labor in securing the data in order that the schedules may be properly made out, viz., that the proper description of the property may be given, that its value and details may be given, that all of the other requisites provided by the law may be complied with, and then to say that this is not chargeable for at professional rates. If these services are not to be charged for at professional rates then in such a case as this it would be incumbent upon the attorney, when a large corporation with large and numerous records, is adjudged an involuntary bankrupt, after being out of the possession of its own books for many months and these books in a chaotic condition, to employ a firm of expert accountants to secure this information for the attorney, but we respectfully submit that there is nothing in the bankruptcy law that will warrant an attorney charging for such services and there is nothing in the bankruptcy law that would warrant a court allowing for the services of an expert accountant in doing such work.

Why should not the bankrupt's attorney fees be paid in such cases as this? He is party to the action. He is perhaps the most interested of any party to the proceedings especially in such cases as this where the schedules show assets of more than three quarters of a million dollars, with liabilities a quarter of a million dollars less, showing that if the assets are properly handled that the bankrupt will receive back after the administration of the estate is

closed a large sum of money. Should the bankrupt in such a case, of all persons, not be allowed the right of an attorney to protect its interests in such a proceeding? The law, by the act of bankruptcy itself, has taken from him all of his property and all of his assets. He has nothing left with which to hire an attorney and we think it clear that the very idea of the framers of the bankruptcy law was that in such cases as this, that the bankrupt would be in need of legal services and that as his creditors had taken from him and from his management all of his property and effects and taken from him the only means that he had to employ professional services, that it becomes incumbent upon the court, acting on behalf of the creditors in such cases, to allow the bankrupt from his own property and his own assets sufficient funds with which to pay a reasonable attorney's fee for the professional services actually rendered in performing the duties which the bankruptcy law has itself imposed upon him.

The Honorable District Judge took the position that the bankrupt appeared merely as a witness and that it was simply incumbent upon him to appear and testify in the case. Such a construction as this would thereby result in the bankrupt, the most interested party in the proceeding, appearing for examination by the creditors and their attorneys, by the trustee and his attorney, and he, the bankrupt—being the most interested party in the proceeding—not having the right to legal counsel to protect his

own interest in the proceeding. If the bankrupt is not entitled to an attorney in such cases as this should the trustee be entitled to have an attorney to conduct the examination for him? Why not carry the same idea through the entire proceeding and say that the trustee himself should conduct the examination of the bankrupt in order to find out the condition of the bankrupt's affairs?

The appellants take the position that this is a legal proceeding in a duly recognized court of the United States and that any party to the proceeding should unquestionably be entitled to the right of counsel therein, and it is a well known fact that in such cases as this every person is represented by counsel, including claimants, trustee, petitioning creditors and bankrupt itself, and to say that because the court has taken from the bankrupt all of his property that he shall then have to appear in person without legal assistance while all the other parties are represented by counsel, puts him at an unfair advantage in such a proceeding and takes from him one of the important rights given him by the bankruptcy law, namely, to have the aid of professional services while peforming the duties prescribed therein.

There might be occasions when the bankrupt's interest would be running counter to that of the crediors and in opposition to the trustee of the bankruptcy law, at which time he would not be entitled to attorney's fees, but in such a case he would not

be performing the duties prescribed in the bankruptcy law but would be performing duties wholly on his own behalf, and we think it is such cases as this that the courts refer to when they say that the bankrupt in involuntary cases is not entitled to attorney's fees in *all* cases. In other words, if the bankrupt is trying to claim property as exempt, but the trustee and creditors believe it is not, and he hires an attorney to protect his interest in the proceeding, this would not be while performing the duties imposed upon him by the bankruptcy law, and we do not think such fees would be allowedable to him out of the estate. Again, if he should be trying to conceal property and not divulge its whereabouts to the trustee and would employ an attorney to assist him, this would not be while performing the duties enjoined by the bankruptcy law, and would therefore not be allowable. It might also be questioned whether an attorney's fee upon his application for discharge would be allowable, as there is no requirement in the bankruptcy law requiring him to apply for a discharge, but this is something that is particularly personal to him. Many other illustrations of services rendered by bankrupt's attorney in involuntary cases might be given where the fee would not be allowable, but so far as we are able to learn there is no case cited either in the reports or in the text books wherein attorney's fees have been denied to a bankrupt in involuntary cases where the bankrupt has been required to attend a lengthy session of the court (39 days as shown

by Record pages 72 to 76) by order of the Court and where he has been examined for more than a month about his affairs, and these meetings have not been prolonged by any act of the bankrupt. The written testimony taken on these hearings covered more than 1500 pages, page 51 Record, where the referee certifies pages 1526 to 1540.

Before leaving this phase of the question we wish to particularly call the court's attention to the fact that not one single day of delay was caused by procrastination or prolixity on the part of the bankrupt, as the evidence in this case shows conclusively that the bankrupt at all times tried to expedite matters and tried to get the proceedings closed in order that the first meeting of creditors should come to an end so their attendance would be no longer required. This appears by the testimony presented on behalf of the claimants wherein they testify to such a state of facts and there is no contradiction of it in the record. (Record, pages 35 to 38).

The matter of an attorney and professional services being required on behalf of the bankrupt have been so squarely and favorably decided by every court that has ever passed upon the same that it seems to us that there should be no question on this point, and that the only questions that would be open for determination would be: First, the number of days attendance by the bankrupt and its attorney upon the hearing; Second, the reasonable value of the services per diem to be allowed for such hear-

ings; Third, was there any delay occasioned by the bankrupt, and if so, this should be deducted from the time allowed.

We particularly call the court's attention to the case of In Re Mayer, 101 Fed. 695, where Judge Seaman in the District Court of Wisconsin, in construing this statute explicitly said:

> "I am of the opinion that the bankrupt is entitled to counsel while undergoing his examination before the referee in respect of his affairs and conduct. Ordinarily this should not require attendance on more than 1 or 2 days. If extended, however, at the instance of the creditors or trustee, without delay needlessly caused by the conduct of the bankrupt in the examination, the time so occupied must be computed in making the allowance."

This matter was squarely up before the honorable District Judge in that case for decision and he so held.

Sec. 15. ELEMENTS TO BE CONSIDERED IN ARRIVING AT REASONABLENESS OF FEE.

In our statement, Sections 2 to 8 inclusive, we have stated the nature of the services rendered, Secs. 3 and 4, the time necessarily employed therein, Sec. 5, the amount involved, Sec. 6, the responsibilities assumed, Sec. 7; and the results obtained, Sec. 8.

We have put our statement in this form because

the United States Circuit Court of Appeals, 5th Dis., in the case of Smith vs. Cooper,, 120 Fed, 231, has cited with approval the case of In Re Curtis 100 Fed, 792, which holds that the above mentioned elements "enter into and should control the judgment upon the value of the professional services."

Sec. 16. DECISION OF DISTRICT JUDGE.

Judge Dietrich in his decision says: (Record, p 71).

> "It is doubtless true, and it is much to be regretted, that the amount allowed is in any view inadequate reasonably to compensate for the time claimants have actually spent upon this account, but, as was said by Judge Phillips in In Re Harrison Mercantile Company (95 Fed. 123), "while the Court personally would be pleased to exercise a spirit of large liberality both towards attorneys and its officers assisting in the administration of bankrupt estates, it must be understood that the court is impressed with a sense of the obligations imposed upon it by the bankrupt act, to so administer it as to preserve both the letter and the spirit of the statute and produce the best results in behalf of creditors," and cites the case In Re Curtis 100 Fed, 792, enjoining economy in the administration of the bankruptcy act.

It will be seen that the Judge concedes that the fee he has allowed is "inadequate reasonably to compensate for the time claimants have actually expend-

ed upon this account," and that he in consideration of economy cut the claimants' fee to what was unreasonable.

In connection with this part of the Judge's decision we desire to again call the court's attention to the case of Smith vs. Cooper, supra, in which the Circuit Court of Appeals said in commenting upon the action of the District Court for the Southern District of Georgia in reducing the attorneys' fees from $1,000 to $196.68:

> "The master found in consideration of this evidence and for other reasons considered valuable by him, that petitioners were entitled to the sum of $1,000. In considering the master's report the learned judge seems to concede that for the services actually rendered the amount allowed by the master was not in excess of reasonable fees, but, for the consideration of economy and the necessity of preserving a good portion of the funds recovered for the benefit of the creditors, he considered it proper to reduce the amount recommended by the master and allow only a small percentage, not of the amount actually recovered, but upon the amount left in the hands of the trustee after paying certain costs of the case. While we agree with the learned judge of the bankruptcy court that to aid the parties and under the law there should be an economical administration of the bankrupt's estate, we are unable to concur with him in his reducing the

fee to be allowed applicant in this case."

We think this case in some respects similar to the one at bar and certainly the reasoning of the appellate court therein is pertinent.

The referee in bankruptcy in consideration of the undisputed evidence before him and all the facts of the case, with which he was acquainted, found that the fees in this case were reasonable. The District Judge "in consideration of economy" and in conflict with the undisputed evidence before the referee and in conflict with the findings of the referee, and having no express testimony on which to base his finding, reduced the fee to a very small amount in this case which he says is "inadequate reasonably to compensate" bankrupt's attorneys.

Sec. 17. DECISION OF JUDGE DIETRICH ON $100 ALLOWANCE.

The referee allowed $100 for preparing the objections and brief on the matter in opposition to the claim of L. F. Connolly, receiver in the state court. (Record, p. 41).

The trustees did not desire to push his objections and the attorneys for the bankrupt prepared their brief, urged their objections and reduced the receiver's claim eleven or twelve hundred dollars which otherwise would have been a prior claim. Judge Deitrich holds that as long as that was the duty of the attorney for the trustee, no compensation can be allowed the attorneys for the bankrupt therefor. In equity and in sound reasoning we do not see why

this amount might not be paid to the attorney for the bankrupt as their acts accrue to the best interest of the creditors, even if it was necessary to deduct the amount from the fees allowed the attorney for the trustee.

Again this was in direct accord with Subdivision 3 of Section 7 of the bankruptcy act which provides among the duties of the bankrupt: "examine the correctness of all proofs of claims filed against his estate."

The creditors having received a great benefit from this service are certainly in poor grace at this time to object to paying a small compensation therefore.

Sec. 18. DECISION OF JUDGE DEITRICH ON CLAIM OF $750.00.

The Judge's reason for reducing this amount seems to be based upon the fact that he considered the matter of preparing the schedules almost altogether a matter of clerical work. The undisputed testimony shows that the stenographer's charges alone for preparing the schedules would be worth $75. The undisputed testimony and finding of the referee who had all the facts before him held that the work of the attorneys was not of a clerical nature and that it was reasonably worth $750. The learned Judge says: Insofar as we are advised by the record the present case is no great exception to the general rule insofar as the reasonable services are concerned. It in indeed difficult to see how any difficult or intri-

cate questions would be involved in such a case." The learned Judge, however, does not say there was any evidence in opposition to the finding of the referee or in conflict with the testimony introduced at the hearing before the referee on the allowance of attorney's fees. It is apparent that the Judge considers a charge of $750 very large, but without any evidence to base his opinion thereon and "in consideration of economy" he reduces the fee to $285.

It seems to us that the honorable Judge throughout his decision bases his findings upon simple conclusions which were in direct conflict with the evidence before him and also the findings of the referee.

In commenting upon the trouble the petitioners had in obtaining the books, the learned Judge says:

> "The receiver was an officer of this court and if he was, either in good faith or bad, withholding the books from the inspection of the bankrupt, I must assume that upon the most informal application to the referee an order would have been made requiring him, under proper conditions, to give access to the books."

The facts and the testimony show positively and the referee so held that the most informal application to the referee did not produce the books and that it was absolutely necessary to make written application and to obtain an order from the referee before the books could even be seen by the bankrupt.

Sec. 19. ATTENDANCE OF ATTORNEYS AT MEETING OF CREDITORS.

In direct conflict with the undisputed testimony and with the findings of the referee that it was necessary for the attorneys of the bankrupt to attend the meetings of creditors, the judge says:

> "While contingencies doubtless may arise doubtless may arise where the assistance of counsel may be reasonably required, it is thought that there is no presumption of such need and that ordinarily attorney's fees for such services are not chargable against the estate * * * He has no obligation except to disclose facts within his knowledge * * * and there is ordinarily no more reason why he, as a witness, should have the protecting care of attendant counsel than that any other witness under any other circumstances should have such protection. * * * Ordinarily why should not bankrupt put himself at the service of the trustee, who is presumably not antagonistic, and who should not, and presumably does not have any motion or incentive to injure him or prejudice him in any of his rights?"

The learned Judge did not attend any of the meetings of the creditors, did not know, as did the referee, that many of the creditors and trustee at times were very antagonistic towards the bankrupt and its officers and did not know that there was a

disposition throughout all of the hearings on the part of some, if possible, to make the bankrupt appear criminally guilty, but the referee in bankruptcy was present at these hearings, knew and saw the witnesses on the stand, was aware of the feeling that existed between the different creditors and the trustee and bankrupt, understood what need the bankrupt and its officers had of counsel, and in the presumption of such knowledge ordered and required that your petitioners as bankrupt's attorneys should attend all of the meetings. It seems hardly fair simply because the Judge thinks that in the ordinary case the bankrupt does not need counsel that in this case such services of the attorneys were not necessary, when there is a specific finding on the part of the referee that such services were absolutely necessary and that he ordered the same.

In ~~connection~~ conclusion, as a matter of public policy, we urge that the attorneys for bankrupt be allowed a reasonable compensation. We submit that there was evidence to support all of the referee's findings and that the conclusions reached by the District Judge were in conflict with the undisputed testimony of the witnesses on the hearing before the referee in bankruptcy and in conflict with the specific findings of the referee in bankruptcy, and that no matter how meritorous the judge's recommendations may be as to the consideration of economy in the administration of the affairs, that it is in behalf of public poli-

cy that reputable lawyers be employed by the bankrupt and that they be paid a reasonable fee. If the Judge's decision holds in this case we submit that no reputable lawyer, living on his income as a lawyer, can become the attorney for bankrupts and that the administration of bankrupt estates will, in the future be greatly retarded for the reason that no competent or reputable lawyer will have anything to do with the same.

In recapitulation, appellants respectfully submit:

1st. That all the services performed by them on behalf of said bankrupt were services preformed for said bankrupt while it was engaged in performing the duties prescribed and imposed upon it by the Bankruptcy Act, namely, the preparation of schedules in detail, provided for by said Bankruptcy Act, the examination of the claims of creditors imposed by the Bankruptcy Act, and the attendance upon the first meeting of creditors as required by the Bankruptcy Act.

2nd. That under Section 64b, subdivision 3, that the payment of a reasonable attorney's fee for the professional services actually rendered the bankrupt in involuntary cases, while he is performing the duties prescribed by the Bankrupty Act, is imposed as a matter of right, and it is not a question of actual necessity or a matter within the discretion of the court, but is a right given the bankrupt by the bankruptcy law and for which compensation must be made out of the estate.

3rd. That each and every of the acts performed by the bankrupt's attorneys and for which a claim is made in this review, were performed and necessarily performed, for the bankrupt while it was performing the duties prescribed, namely, the preparation of the schedules which is imposed upon him by the bankrupty law and the attendance of the meeting of creditors which is imposed upon him by the bankruptcy law, and that your petitioners are entitled to a reasonable attorney's fee for each and all of said services to be determined upon by the basis of professional services actually rendered, and that includes a reasonable fee under the facts as shown in evidence for preparing the schedules, a reasonable fee for examining the claim of Lawrence F. Connolly and expunging a large amount thereof, a reasonable per diem for attending the first meeting of creditors the thirty-seven days for which compensation is claimed.

We respectfully submit to this honorable court that the Honorable District Judge erred in refusing to allow a reasonable compensation for these services and that his order in so doing should be reversed and the order of the Honorable Referee allowing appellants a reasonable compensation for such services should be approved by this court, in order that justice might be done in the premises, and your petitioners receive a reasonable attorney's fee for the professional services actually rendered the bangrupt in involuntary bankruptcy proceedings while perform-

ing the duties prescribed by the bankruptcy law as authorized and required by Section 64b, subdivision 3, of the Act of Bankruptcy.

EZRA R. WHITLA,
R. S. NELSON,

Residence and P. O. Address, Coeur d'Alene, Idaho;
In Proper Person.

GRAVES, KIZER & GRAVES,
Residence and P. O. Address, Spokane, Washington; Of Counsel.